NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SANDER L. JOHNSON
HAROLD B. BERNSON
1800 Avenue of the Stars
Suite 415
Los Angeles, California 90067

Attorneys for Appellant

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STATUTORY BASIS OF APPEAL

Date of conviction: June 22, 1967

Date of sentence: September 11, 1967

Appellant, on December 12, 1967 filed a timely Notice of Appeal (Clk. Tr. 62).

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 2113a and Section 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

I

Proceedings to Date

Appellant was charged with one count of violation of Title 18, United States Code, Section 2113a (Clk. Tr. 3), to which he pleaded not guilty (Clk. Tr. 4) and proceeded to trial by jury on June 20, 1967 (Clk. Tr. 10). After a verdict of guilty by the jury (Clk. Tr. 25) judgment of conviction was entered (Clk. Tr. 61). Appellant thereafter made a motion for new trial supported by his affidavit and supplementary affidavit (Clk. Tr. 30, 39). Said motion was denied on September 11, 1967, and judgment of conviction and sentence then entered (Clk. Tr. 61).

II

The Facts of This Case

The testimony of the significant witnesses relating to the issues raised by appellant will be summarized, and references in brackets will be to the Reporter's Transcript unless otherwise noted as Clerk's Transcript.

Appellant, a resident of Huntington Beach, California, at all times herein mentioned was and now is employed by Don W. Snyder Company, a liquor distributing company in Los Angeles, as a hotel and club manager (139, 159).

On March 15, 1967, at about 2:40 p.m., La Canada Branch of the Bank of America, 651 Foothill Boulevard, La

Canada, California (hereinafter called "the Bank") was robbed of $954.00 (80-84).

At approximately 6:52 p.m. appellant was arrested as he arrived at his home in Huntington Beach as suspect of the crime (130-132).

At some time after the arrest appellant was advised orally of his constitutional rights (132) and at that time, he signed a written waiver of such rights with the time of signing noted at 7:38 p.m. (132-135). Appellant arrived at his home, at the time of arrest, in a 1965 white Comet, California License No. NGE 890 (131, 136).

On questioning by the arresting officers at the Huntington Beach Police Department, appellant denied involvement in the robbery and accounted for his activities on the day in question, during all of which only he had driven the 1965 Comet (135-137). Included in his activities, as stated by him to the officers on being questioned, was a stop at the Bank for the purpose of making telephone change from a five dollar bill so as to make telephone calls along his sales route (137). He also told the arresting officers he performed paperwork while parked outside the bank, before going in to get the change (137).

At the time of the arrest one of the arresting officers searched the trunk of appellant's vehicle and found $46.00 in one dollar bills in the left tire well and $209.00 in currency in a golf bag located therein (155). Appellant volunteered to the questioning officers on his arrest that he had approximately $150.00 in a golf

bag cover in the trunk of his car, but did not know where any other money would have come from (138-139).

At trial the arresting officers testified to the foregoing circumstances surrounding the arrest and the statements attributed to the appellant.

Bank personnel testified by way of identification of the defendant. The bank was located at the northwest corner of Oakwood Street and Foothill Boulevard in La Canada(7).

Two of the bank personnel, witness Jones and witness Hastie, identified the appellant as observed seated in a white car License No. NGE 890 parked outside the bank, for some fifty minutes prior to the robbery; stated that he was taking his glasses off and on and appeared to be working on some papers; and further that he drove away from the point where he was parked and returned to the same spot on more than one occasion (6-18).

Witness Jones identified the appellant as a man who later came in the front door of the bank and went to the window of witness Hastie, then departed to return fifteen to twenty minutes later, at which time he held up witness Canada, a teller (21-23).

Witness Hastie testified that after she had observed appellant parked in his car outside the bank, he came to her teller window inside the bank and asked for and received change for a twenty dollar bill, whereupon he departed through the front door (52-54); that approximately ten minutes later she saw appellant come back into the bank, go to the window of teller Maria Canada, then depart by way of the rear door (55-57).

Witness Canada identified the appellant as the person who held her up at about 2:40 p. m., after placing a brief case on the counter in front of her teller window, and that he then departed by way of the back door of the bank (80-87). This identification was confirmed by the testimony of witness Corey (97-99).

Other bank personnel identified the appellant as leaving the bank at about the time of the robbery by way of the back door, getting into a white Comet and then driving away (111-117, 122-124).

Cross-examination of the prosecution witness for the most part was brief and of the nature of a recapitulation of the testimony given on direct examination. No testimony was elicited from either prosecution or defense witnesses concerning the placing of appellant in a lineup for purposes of identification, after his arrest.

On his own behalf, appellant testified that on March 15, 1967 he drove his 1967 Comet, License NGE 890, from his office for the purpose of calling upon accounts in the Glendale area and that he then proceeded to the following places for the same purpose: Oakmont Country Club, Montrose Vons Grocery, La Canada Country Club, Sparr Restaurant on Foothill Boulevard near the bank, where he had lunch; then at 1:30 to 2:00 p. m. to Vons Grocery across the street from such restaurant; thereafter he parked outside the bank facing north on Oakwood Street above Foothill; there he sat in his car, posted sales in his route book and outlined his route for the balance of the day; he had been

in the bank several times before as a place of convenience on his sales route for the purpose of making interbank deposits and getting change; prior to March 15, he had seen some of the bank personnel who had testified against him and had spoken to the witness Kieffer, a bank employee; he went into the bank by the front entrance and got telephone change for a five dollar bill; he drove north on Oakwood and returned to Foothill Boulevard where he phoned his office from a service station; he got into his car and proceeded west on Foothill to a point in front of the bank where he made a U-turn so as to go east on Foothill; he then completed his business calls for the balance of the day, going to West Covina, Glendora, Fontana and Upland; he then telephoned his wife in Huntington Beach who advised the police who were looking for him; he arrived home at about 7:00 p.m.; after his arrest and questioning he told police he had between $150.00 and $200.00 in his golf bag in the car, which he was saving for his 25th wedding anniversary; he did not return to the bank after cashing his five dollars; he did not wear a hat or carry an attache case, as testified by prosecution witnesses at the time he was allegedly committing the robbery (all of the foregoing, 159-178); the sales book he was working on while seated in his car outside the bank had been taken by the Federal Bureau of Investigation and later returned to him and the results of his work for the afternoon of March 15, 1967 are recorded in that book (174); the last time, prior to March 15, he had been in the bank was from one week to ten days to two weeks (182, 223).

Appellant's wife was called briefly on his behalf to confirm that prior to appellant's return to their home on March 15, he telephoned her and she advised him that the police had been there looking for him (195-197). The only other witnesses called by appellant were character witnesses.

In rebuttal appellee produced evidence of a palm print on the counter at witness Canada's teller window, which palm print the expert believed to be that of appellant (212-214).

The parties stipulated that the Bank is a bank within the statutory definition of a member bank of the Federal Reserve System as required and defined by Sections 2113a and 2113f of Title 18, United States Code (253).

In addition to the foregoing, as shown by the affidavit and supplemental affidavit of appellant (Clk. Tr. 30, 39), the following facts appear.

After questioning by the arresting officers on March 15, 1967 at the Huntington Beach Police Department appellant was transported to the Lakewood office of the Los Angeles County Sheriff's Department and thereafter to the Los Angeles County Jail, where he removed his civilian clothing and put on jail clothing provided him. Appellant was then placed in a lineup with three other men, each of whom wore a white band on his wrist of the type worn by jail inmates. Appellant did not wear such a band. The three other men who were in the lineup were of a different height, stature and complexion and appellant estimated a ten year difference in their ages and his. At the request of officers, he

repeated certain statements, in substance: "Be quiet. Go to the vault and get me the money." Appellant was also asked to place glasses on his face, as were the other persons in the lineup. When initially arrested, appellant was informed of constitutional rights respecting the right to counsel and that he may remain silent; but at the time of being placed in the lineup, which had to be some hours later, no one informed him he had a right to have counsel present at such a procedure. Had appellant known he had the right to have an attorney present at the lineup, he would have requested counsel (Clk. Tr. 30-32).

On March 17, 1967, two days after his arrest, appellant dictated and had transcribed all the facts as he knew them surrounding his activities and conduct on the day of the alleged offense. This document detailed persons with whom he was in contact on said day and charted his activities of that day in order to establish that the arrest and identification of appellant as the robber of the bank was a matter of mistaken identification. Said document was given to counsel who represented appellant at trial, and appellant suggested the persons referred to therein be called as witnesses on his behalf for the purpose of establishing his pattern of activities on the day of the robbery, and his condition, attitude and emotional state both before and after the robbery. One of said witnesses would have testified to the effect that appellant had a severe limp and was wearing a soft shoe on his left foot because of a sore condition of the foot (Clk. Tr. 39-48).

After his original consultation with trial counsel, appellant,

other than a final conference the friday before trial, consulted said counsel on two occasions, each lasting fifteen to thirty minutes and spoke again of calling the mentioned witnesses on his behalf. In addition, appellant spoke of testimony to establish his background and position, the fact that he had earned in excess of $15,000.00 per year for three years working for his employer, and that he would earn considerably in excess of such figure in 1967 (Clk. Tr. 39-48).

At least eight persons, as indicated in said memorandum given to counsel, could have been called to establish the general pattern of appellant's activities on Wednesdays of every week and the facts and circumstances as they knew them on the particular Wednesday of March 15, 1967. Said testimony and evidence would have gone to the issue of motivation, whether appellant was likely to have committed the offense charged, and mistaken identification, and to show that in connection with his business activities, he was often near and in the bank which was robbed. Appellant's route notebook with entries and notations showing the reason for his being in the area of the bank and the various places of business visited by him on March 15, 1967 was available but was not put into evidence. Appellant was surprised when the witnesses and evidence herein referred to were not produced at trial and that no issue was made at trial of the previous identification of himself at the lineup as the person who had committed the robbery (Clk. Tr. 39-48).

SPECIFICATION OF ERRORS RELIED ON

The District Court erred in denying appellant's motion for a new trial, upon the ground that he had been deprived of a fair trial and denied effective aid of counsel within the meaning of constitutional rights afforded him.

QUESTIONS PRESENTED

I

In the totality of the circumstances surrounding appellant's trial and conviction, was he deprived of a fair trial within the meaning of due process of law?

II

Was the presentation of evidence and testimony on behalf of appellant at trial sufficiently adequate so as to constitute a fair trial within the meaning of due process of law?

SUMMARY OF ARGUMENT

In the totality of the circumstances surrounding his arrest and conviction, with particular reference to subjecting him to lineup procedures, appellant did not receive a fair trial within the concept of due process of law as enunciated by the Supreme Court in recent cases. Further, in the presentation at trial of appellant's defense, there was a failure to present the cause of

appellant in fundamental respects, thus denying appellant a fair trial and effective aid of counsel.

I

TAKING INTO ACCOUNT ALL PROCEEDINGS AGAINST HIM FROM TIME OF ARREST TO TIME OF CONVICTION, WITH PARTICULAR REFERENCE TO LINEUP PROCEDURES, APPELLANT DID NOT RECEIVE A FAIR TRIAL.

In the time since appellant's trial and conviction, pertinent decisions of the Supreme Court upon the issues raised have been published: United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967); Gilbert v. State of California, 388 U.S. 262, 87 S. Ct. 1951 (1967); Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967 (1967).

The facts upon which these cases are based are well known by now, having to do with the right to counsel at all stages of the proceedings against a defendant; the question whether in-court identification was in truth based upon observations made by the witness at the time the crime was committed and whether in the context of all the proceedings against a defendant, including lineup, he has received a fair trial within the concept of due process.

It is the contention of appellant that in the entire context of the proceedings against him, with particular reference to the lineup to which he was subjected, he did not receive a fair trial, and that this conclusion follows from careful examination of the

cases cited, and from more recent authorities.

In each of the three cases above mentioned, in addition to the in-court identifications made of the defendant, the witnesses admitted to lineup identification, in contrast to the situation at hand where the lineup identification was not brought out. Nevertheless, as will hereinafter appear, the reasoning of the Supreme Court makes the principles of these three cases applicable here.

In summary the applicable principles are:

1. The lineup procedure is indeed a critical point in the criminal proceedings, one where the die of defendant's guilt may be so cast as to make the trial a formality.

As the court said in Wade (p. 224):

> "In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings."

And, further at p. 298 of Stovall:

> "We have, therefore, concluded that the confrontation is a 'critical stage', and that counsel is required at all confrontations."

2. The very procedure is one fraught with the possibility of abuse unless governing rules of fairness are observed.

On this point the court in Wade said further (p. 228):

> "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted?' "

3. By the very hypothesis a defendant is entitled to have an attorney present at such proceedings unless he has intelligently waived such right (Wade, p. 237).

4. The testimony of identifying witnesses at trial may not be tainted with violation of such constitutional right of the accused (Wade, pp. 238-240).

5. The right to cross-examination of such witnesses as to whether their identification at trial was formed independent of the lineup procedure is part and parcel of the concept of fair trial (Wade, pp. 239-241).

To quote further from Wade, p. 227:

> "In sum, the principle of Powell v. Alabama

and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

In the case at bar the prosecution, as it need not have, did not examine the identifying witnesses upon the matter of previous lineup identifications, nor did counsel for appellant make such inquiry upon cross-examination.

In support of his motion for new trial appellant submitted his affidavit and supplemental affidavit wherein are set forth some of the facts and circumstances surrounding a lineup where he was presumably exposed for identification to persons who claimed to have observed the robbery (Clk. Tr. 30, 39). Without question the lineup procedures employed could not meet the criteria mentioned in United States v. Wade. There the court mentioned such disqualifying factors as: placing only a few persons in the lineup with the accused; the marked dissimilarity in appearance between the suspect and the others; and the impermissibility of using

words allegedly used during a criminal act (pp. 233, 236-237).

Here only three other persons appeared with defendant. The physical differences between appellant and these three were such as to make the exposure individious to the point of being obvious. Appellant wore no jail identification bracelet; the others did. His physical characteristics and age were grossly dissimilar to theirs. He wore on one foot a regular walking shoe and on the other a soft, white shoe (because of a lame foot).

Thus, the situation at lineup was to, begin with, fraught with the very dangers to an accused which the Supreme Court dwelt upon at length in Wade. In the circumstances, it is submitted, the court must closely scrutinize both the question of whether appellant had intelligently waived his right to counsel (standing alone as he was against the state at a stage of the prosecution - formal or informal, in court or out - where counsel's absence might derogate from his right to a fair trial, United States v. Wade, supra, p. 226), and whether absent exposure at trial of the facts surrounding lineup identification it can be said he received a fair trial within the concept of constitutional guarantees.

As in the Wade case, on the record before the court the questions are difficult to resolve. But, as there, the court can grant relief, following the suggestions of the Supreme Court (p. 242):

> "On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This

was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, of whether, in any event, the introduction of the evidence was harmless error."

Testimony was adduced at trial to the effect that appellant was initially advised of his constitutional rights, including the right to counsel. He even signed a statement acknowledging such advice. But the question here must be whether such advice, given at one critical and early stage of the criminal proceedings, suffices in relation to a stage later in time, one which does not obviously come within the ambient of meaning of the original advice, and in turn this factor must be considered in relation to the question whether in the total circumstances appellant received a fair trial.

The Supreme Court's comments in Wade on the particularly significant and emotional procedure of lineup puts the answer in doubt (pp. 230-231):

"Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one

being confronted with potential accusers."

Appellant not having had the benefit of counsel at the lineup, counsel at trial was surely in the classic dilemma mentioned by the court in Wade at pp. 240-241, on account of which it may be well said of appellant that he has suffered the consequences of that dilemma. There the court said:

> "The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself--realizing that possible unfairness at the line-up may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover the reveal unfairness, while bolstering the government witness courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the line-up would equip him to attack not only the line-up identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the line-up itself disregards a critical element of that right."

The court there further pointed out at page 242 that from the record it was impossible to determine whether the in-court identifications had an independent origin. The court believed that inquiry should be made in the District Court.

The court stated specifically at page 242:

> "We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error."

It was said too that no hard and set rule can be made regarding exclusion of courtroom identification by reason of the absence of counsel at lineup. Rather, it was pointed out that the Government should be given the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than at the lineup (p. 240). The rules as laid down in Wade were not yet available at the time of appellant's trial so as to have guided the trial court respecting the admissibility of courtroom identifications.

In any event, appellant's own statement in his affidavits that he did not realize his rights include the presence of counsel at the lineup stage clearly shows any claimed waiver of such rights could not have been intelligently made, as required.

As already pointed out, in the case at hand this lack may

only relate to the most basic issue of all -- whether the whole fabric of the proceedings can be fashioned into the cloak of fair trial guaranteed to the defendant. Wade requires that the court scrutinize any pretrial confrontation of the accused to determine whether presence of counsel was necessary to preserve his right to fair trial as affected by his right meaningfully to cross-examination of witnesses against him. Security of the right to fair trial was said to be as much the aim of right to counsel as it is of the other guarantees of the Sixth Amendment.

The court here has before it not merely the pat, almost glib, unchallenged identification of defendant as made by the prosecution witnesses at trial. Rather, it may now consider all the facts surrounding the arrest and detention, including the critical stage of the lineup identification, as shown by the affidavits submitted by appellant. The resultant duty of the court, it is submitted, is to apply the test of fair trial within this context. This it should do bearing in mind the fact that appellant's only defense to the charge, one which he anticipated presenting through the testimony of numerous witnesses and himself, was that he had been mistakenly identified as the robber. Part and parcel of a fair trial for appellant would be meaningful cross-examination of identifying witnesses as mentioned by the court in Wade (p. 227, above quoted), which could never be achieved if in fact his constitutional rights were violated as now claimed.

Thus, this Court is in a position to rectify the appellant's situation, to make certain by directing a new trial that all

appellant's rights have been preserved -- his right to counsel at a critical stage of the proceedings, to be deemed abandoned only upon intelligent waiver, and his right, in the light of all circumstances, to a fair trial where all defenses and issues are heard.

While it is true that Stovall applied Wade and Gilbert only prospectively, i.e. as to those lineups held subsequent to June 12, 1967, the case of United States v. Meyers, 381 F.2d 814 (1967) is helpful. Thereafter noting such limited application of the doctrine, the court said at pages 816-817 of the doctrine:

> "Relator is not precluded, however, from inquiring into the 'totality of the circumstances' surrounding the line-ups in order to determine whether the procedures were so unfair as to deprive him of a fair trial. Stovall v. Denno, supra at 302, 87 Supreme Ct. 1951, and see Palmer v. Peyton, 359 Fed. 2d 199 (4 Cir. 1966), cited with approval in Stovall at 302 of 387 U.S., 87, S. Ct. 1967."

This concept of fairness, i.e. apart from the sole question of the right to counsel at lineup, was applied by the Court of Appeals for the District of Columbia Circuit in a case where identification was made only minutes after apprehension. While refusing to find the circumstances of the confrontation so unfair as to require exclusion of testimony thereof under Stovall and the due process clause of the Fifth Amendment, because of the

circumstances of fresh identification, the court said:

> "It may be that in a particular case there would be reason, without denying the general principle of prompt identifications, to say that the particular identification was conducted in such an unfair way that it cannot tolerably be admitted into evidence."

Wise v. United States, 383 F. 2d 206, 210 (1967).

Again, in a recent decision of the Supreme Court of California, this rule was applied where the identification had taken place prior to June 12, 1967: People v. Caruso, ___ A. C. ___, 65 Cal. Rptr. 336, 436 P. 2d 336 (1968). The facts of the case before the court were similar to those at hand. A store was robbed at about 12:45 p. m. At about mid-morning one of the employees, who was later one of the two persons actually robbed, had observed the defendant in a car parked on the store parking lot. Other witnesses had observed the defendant in the area at later time of day. Defendant was arrested on the night of the robbery and the next morning was placed in a lineup with four other men, and the testimony of both witnesses for the defense and prosecution established that the other lineup participants did not physically resemble the defendant in important respects.

The two victims identified defendant as the driver of the robbery car. One of them further identified defendant as the man in the store parking lot who had briefly attracted his notice earlier

that morning. Other witnesses placed defendant in the vicinity of the store at a time later in the day. The two victim witnesses were questioned as to circumstances surrounding the identification of the defendant at the lineup the morning after the arrest.

The California court took note that under Stovall the rule of Wade and Gilbert is to be given only prospective application. However, the court went on to hold that the lineup resulted in such unfairness that it infringed upon defendant's right to due process of law, since the lineup was unnecessarily suggestive and conductive to irreparable mistaken identification. The court specifically held that the lineup's grossly unfair make up deprived defendant of due process of law (pp. 339, 340). The court took note of other circumstances lending credence to the defense, such as the fact that a police search of the defendant's home failed to reveal either the automatic pistol or the missing receipts, that no motive for the offense was ever established, that defendant was steadily employed at satisfactory wage and maintained a good reputation at work, and was married with children.

Thus in the totality of the circumstances surrounding the trial and conviction of appellant, it may be said at the very least that it does not clearly appear that appellant received a fair trial under the concept of due process of law.

II

THE PRESENTATION OF EVIDENCE AND TESTIMONY ON BEHALF OF APPELLANT AT TRIAL WAS INADEQUATE SO AS TO CONSTITUTE DENIAL OF A FAIR TRIAL AND THE LACK OF EFFECTIVE COUNSEL.

Appellant recognizes the extreme difficulty of raising the issue of failure to present an adequate defense and lack of effective counsel at trial. Nevertheless, again considering the totality of the circumstances, it must surely appear from his supplemental affidavit submitted in support of his motion for new trial (Clk. Tr. 39) and from the testimony as shown in the Reporter's Transcript that in certain fundamental respects there was a failure to present his cause.

It may be true that the failure to question identifying witnesses concerning their prior identification at lineup resulted from a dilemma and confusion faced by counsel that in effect was resolved only after trial, by Wade, Gilbert and Stovall. Yet appellant had anticipated, counted upon, a presentation of testimony and evidence concerning the pattern of conduct of his activities on every Wednesday of the week and on the particular Wednesday of the robbery with which he was charged. He was lame that day, but no mention was made of this by identifying witnesses, nor was the fact brought out on cross-examination. This fact could have been collaborated by several witnesses on behalf of appellant. In the course of his business, as he was going through his normal Wednesday routine, appellant met and talked with numerous persons,

both before and after the robbery, who could have testified concerning his attitude, emotions and state of mind -- all of which may have had effect as to appellant's possible motice or lack thereof for commission of the crime.

The significance of the failure to call these witnesses may ruddily be seen from the statements of the prosecutor in his closing argument, where he remarked in a challenging manner upon the absence of such witnesses (241).

Traditionally, the law upon this subject has in summary been that to warrant reversal of a conviction, the defendant must make a showing that in effect no defense at all was offered in his behalf. Anno., 24 A. L. R. 1025, 64 A. L. R. 436. However, it is submitted that in this field of law, as in most, changing times make for changing concepts. A recent California case is perhaps symtomatic of this trend: People v. Welborn, ___ A. C. A. ___, 65 Cal. Rptr. 8 (1968). There the defendant pleaded not guilty and not guilty by reason of insanity, to a charge of murder. By stipulation, in which defendant personally joined, the guilt issue was submitted to the court upon the transcript of the preliminary hearing and of a conversation between defendant and the investigating officer. Both sides waived argument. The court found defendant guilty of murder in the first degree. By stipulation, in which defendant personally joined, the sanity issue was submitted for decision by the court upon the reports of five psychiatrists who had examined the defendant. The court found defendant sane at the time of the homicide and at all times during trial, and

sentenced him to life imprisonment.

Defendant there made a motion for new trial which his counsel submitted without argument. The motion was denied. The record before the appellate court was augmented to include the reports of the five physicians who had examined him.

The California court concluded that the failure of defense counsel to offer in evidence at the guilt phase of the trial the psychiatric evidence that the record shows was available, at the same time neither offering nor arguing any other defense, resulted in a total failure to present the cause of the defendant in any fundamental respect, and thereby deprived him of his constitutional rights to effective aid of counsel. Accordingly the judgment of conviction was reversed. The court took note that the defense of diminished capacity would have been a defense available in the guilt phase of the trial and stated that it was counsel's duty to investigate carefully all defenses of fact or law that may be available to the defendant; and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled.

An examination of the supplemental affidavit of the appellant (Clk. Tr. 39) shows the brief time appellant was allowed to spend with his trial counsel by way of preparation for trial, his submission to counsel of a five page single-spaced typewritten memorandum detailing the basis for his defense, showing many witnesses who could have testified on his behalf, and that despite all this counsel for appellant at trial chose only to make cursory examination of

appellant on his own behalf, and to call no other witnesses other than character witnesses, and, briefly, the wife of appellant.

It is submitted that it is only necessary to point out that for whatever reason, however arrived at, the record reveals appellant's only defense -- his only hope for exoneration, and all the issues raised thereby, were never brought fully to the attention of the court and jury, this to the complete and pardonable surprise of the appellant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order denying a new trial and the judgment of conviction should be reversed and the cause remanded with an order directing a new trial.

Respectfully submitted,
HAROLD B. BERNSON and
SANDER L. JOHNSON
By: SANDER L. JOHNSON
Attorneys for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Sander L. Johnson
SANDER L. JOHNSON